Apex Marble Sdn Bhd & Anor v Leong Tat Yan

HIGH COURT (KUALA LUMPUR) — SUIT NO WA-22NCVC-668–10 OF 2016
NANTHA BALAN J
25 APRIL 2017

Civil Procedure — Jurisdiction — Challenge to jurisdiction — Plaintiffs sued defendant for breach of contract, tort of inducing breach of contract and breach of fiduciary duties — Defendant filed application to set aside writ on grounds of lack of jurisdiction — Whether court had jurisdiction

Civil Procedure — Stay of proceedings — Forum conveniens — Plaintiffs sued defendant for breach of contract, tort of inducing breach of contract and breach of fiduciary duties — Defendant filed application to stay action on basis that court in Vietnam would be more appropriate forum for adjudication of dispute — Whether Vietnam appropriate forum for adjudication of dispute

The plaintiffs had entered into separate non-exclusive dealership agreements ('the agreements') with the defendant's nominee, one Pham Thi Minh Phuong ('Phuong'). Under the agreements, Phuong was appointed as a non-exclusive dealer to sell and market the plaintiffs' products in Vietnam. The plaintiffs contended that the defendant was the actual party to the agreements and Phuong merely acted on the defendant's instructions. The plaintiffs further contended that the defendant by himself and/or through Phuong had breached the express and/or implied terms of the agreements. Consequently, the plaintiffs terminated the agreements and commenced an action against the defendant for breach of contract, tort of inducing breach of contract and breach of fiduciary duties. In relation with breach of contract, the plaintiffs submitted, inter alia, that the defendant had allegedly failed to remit payments to the plaintiffs in Malaysia, failed to return the unsold stock upon the event of default, failed to send the bank in slips to the plaintiffs and had cut off the servers which prevented the plaintiffs from having access to the system from Malaysia. In response, the defendant filed an application to set-aside the writ on the grounds of lack of jurisdiction ('encl 10') and also an application to stay the action, on the basis that the court in Vietnam would be the more appropriate forum (forum conveniens) for the adjudication of the dispute herein ('encl 11').

Held, dismissing encls 10 and 11 with costs:

(1) The fact that the defendant had an address in Malaysia as per JPN records was sufficient to trigger the qualification of residence in Malaysia for purposes of s 23(1)(b) of the Courts of Judicature Act 1964 ('the CJA'). Further, the fact that the defendant had allegedly failed to remit payments to the plaintiffs in Malaysia, failed to return the unsold stock upon the event of default, failed to send the bank in slips to the plaintiffs and had cut off the servers which prevented the plaintiffs from having access to the system from Malaysia and there being an allegation of breach of directors duties in respect of the second plaintiff, which was a company in Malaysia and the breach having to be determined in accordance with Malaysian company law, were all matters which manifested or occurred in Malaysia and thus gave rise to the jurisdiction of the court under s 23(1)(a) and (c) of the CJA. Thus, the court had in the requisite jurisdiction over the defendant (see paras 59 & 67).

(2) In the present case, cll 26.2 and 27.1 of the agreement strongly indicated that the Malaysian court was the appropriate forum. It would be far too onerous and burdensome for the plaintiffs to file a suit in Vietnam as there was absolutely no evidence that the action would be disposed of expeditiously in Vietnam quite apart from the cost of conducting a case there and having to transport all of the plaintiffs' witnesses to Vietnam. It would also be unjust to insist that the suit be filed in Vietnam when no evidence had been adduced in relation to the issue of time-bar, availability of causes of action or remedies. Further, it was apparent that the relevant law was Malaysian contract and company law with there being no suggestion that Vietnamese law was or would be involved in the determination of the dispute. In conclusion, it was clear that the defendant had failed to discharge the burden of establishing convincingly or at any rate on a balance of probabilities that the court in Vietnam was the more appropriate forum for the adjudication and determination of the plaintiffs' claims against the defendant (see paras 68, 71 & 73–74).

[Bahasa Malaysia summary

Plaintif-plaintif telah memasuki perjanjian-perjanjian pengedar tidak eksklusif ('perjanjian tersebut') dengan penama defendan, Pham Thi Minh Phuong ('Phuong'). Di bawah perjanjian tersebut, Phuong telah dilantik sebagai pengedar tidak eksklusif untuk menjual dan memasarkan produk plaintif-plaintif di Vietnam. Plaintif-plaintif berhujah bahawa defendan adalah pihak sebenar kepada perjanjian tersebut dan Phuong hanya bertindak atas arahan defendan. Plaintif-plaintif selanjutnya berhujah bahawa defendan dengan sendiri dan/atau melalui Phuong telah melanggar terma-terma nyata dan/atau tersirat perjanjian tersebut. Akibatnya, plaintif-plaintif telah menamatkan perjanjian tersebut dan memulakan tindakan terhadap defendan kerana pelanggaran kontrak, tort mendorong pelanggaran kontrak dan pelanggaran kewajipan fidusiari. Berkaitan pelanggaran kontrak,

plaintif-plaintif berhujah, antara lain, bahawa defendan dikatakan telah gagal meremitkan bayaran-bayaran kepada plaintif-plaintif di Malaysia, gagal untuk mengembalikan stok tidak dijual sekiranya berlaku kegagalan, gagal menghantar slip-slip masuk bank kepada plaintif-plaintif dan telah memotong server-server yang menghalang plaintif-plaintif daripada mempunyai akses kepada sistem dari Malaysia. Sebagai jawapan, defendan telah memfailkan permohonan untuk mengetepikan writ atas alasan tidak mempunyai bidang kuasa ('lampiran 10') dan juga permohonan untuk menggantung tindakan, dengan asas bahawa mahkamah di Vietnam merupakan forum yang lebih sesuai (forum conveniens) untuk mengadili pertikaian tersebut ('lampiran 11').

Diputuskan, menolak lampiran-lampiran 10 dan 11 dengan kos:

(1) Fakta bahawa defendan mempunyai alamat di Malaysia sepertimana dalam rekod JPN adalah mencukupi untuk menunjukkan kelayakan kediaman di Malaysia bagi tujuan s 23(1)(b) Akta Mahkamah Kehakiman 1964 ('AMK'). Selanjutnya, fakta bahawa defendan dikatakan telah gagal untuk meremitkan bayaran-bayaran kepada plaintif-plaintif di Malaysia, gagal untuk mengembalikan stok tidak dijual sekiranya berlaku kegagalan, gagal menghantar slip-slip masuk bank kepada plaintif-plaintif dan telah memotong server-server yang menghalang plaintif-plaintif daripada mempunyai akses kepada system dari Malaysia dan terdapat dakwaan pelanggaran kewajipan pengarah berkaitan plaintif kedua, yang merupakan syarikat di Malaysia dan pelanggaran itu perlu ditentukan menurut undang-undang syarikat Malaysia, merupakan semua perkara yang bermula atau berlaku di Malaysia dan oleh itu menimbulkan isu bidang kuasa mahkamah di bawah s 23(1)(a) dan (c) AMK. Oleh itu, mahkamah tersebut mempunyai bidang kuasa ke atas defendan (lihat perenggan 59 & 67).

(2) Dalam kes ini, fasal-fasal 26.2 dan 27.1 perjanjian jelas menunjukkan bahawa mahkamah di Malaysia adalah forum yang sesuai. Ia terlalu berat dan membenarkan untuk plaintif-plaintif memfailkan guaman di Vietnam kerana tidak terdapat apa-apa keterangan langsung bahawa tindakan tersebut akan diselesaikan dengan cepat di Vietnam yang agak berbeza daripada kos mejalankan kes di sana dan yang memerlukan penghantaran semua saksi-saksi plaintif-plaintif ke Vietnam. Ia juga tidak adil untuk mendesak agar guaman itu difailkan di Vietnam apabila tiada keterangan telah dikemukakan berkaitan isu luput masa, ketersediaan kausa tindakan atau remedi. Selanjutnya, ia adalah jelas bahawa undang-undang relevan adalah kontrak Malaysia dan undang-undang syarikat di mana tiada cadangan bahawa undang-undang Vietnam adalah dan akan terlibat dalam penentuan pertikaian tersebut. Kesimpulannya, adalah jelas bahawa defendan telah gagal melepaskan beban membuktikan secara berkesan atau pada apa-apa

kadar atas imbangan kebarangkalian bahawa mahkamah di Vietnam adalah forum yang lebih sesuai untuk mengadili dan menentukan tuntutan plaintif-plaintif terhadap defendan (lihat perenggan 68, 71 & 73–74).]

Notes

For cases on challenge to jurisdiction, see 2(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 6020–6022.

For cases on forum conveniens, see 2(5) *Mallal s Digest* (5th Ed, 2017 Reissue) paras 9128–9134.

Cases referred to

American Express Bank Ltd v Mohamed Toufic Al-Ozeir & Anor [1995] 1 MLJ 160, SC (refd)

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189, SC (refd)

Dato' Param Cumaraswamy v MBF Capital Bhd & Anor [1997] 3 MLJ 824, CA (refd)

Harrah's Operating Co Inc (trading as Harrah's Casino Hotel Lake Tahoe & Bill's Lake Tahoe Casion) v Wu Yun Shya Josephine and another appeal [2008] 4 MLJ 63, CA (folld)

Shearn Delamore & Co & Anor v Joseph Lee Henn Shen [1998] 3 MLJ 833, CA (refd)

Legislation referred to

Arbitration Act 1952 (repealed by Arbitration Act 2005)
Courts of Judicature Act 1964 s 23(1), (1)(a), (1)(b), (1)(c)
National Registration Regulations 1990 reg 4(a)(cc)(iii)
Rules of Court 2012 O 12 rr 10(1), (2)

Dhinesh Bhaskaran (Khor Meyven and Chong Mei-Yan with him) (Shearn Delamore & Co) for the plaintiffs.
Chong Joo Tian (JT Chong Assoc) for the defendant.

Nantha Balan J:

INTRODUCTION

[1] There are two applications before me and they are both by the defendant. The present suit is the fourth legal action by the plaintiffs against the defendant. The defendant filed an application to set aside the writ on the grounds of lack of jurisdiction and also an application to stay the action, on the basis that the court in Vietnam would be the more appropriate forum ('forum conveniens') for the adjudication of the dispute herein. These are my grounds of judgment in respect of the following:

(a) an application dated 21 November 2016 ('encl 10') by the defendant under O 12 r 10(1) of the Rules of Court 2012 ('the ROC') for a declaration that the court has *no jurisdiction* over the defendant and for consequential relief; and

(b) an application dated 21 November 2016 ('encl 11') by the defendant under O 12 r 10(2) of the ROC for a declaration that this court is *not the appropriate forum* to try the plaintiffs' claims and consequently for a stay of the proceedings.

[2] Order 12 rr 10(1) and (2) of the ROC read as follows:

Rule 10(1)

(1) A *defendant who intends to dispute the jurisdiction of the Court* in the proceedings by reason of any irregularity as is mentioned in rule 9 or on any other grounds shall enter an appearance and, within the time limited for serving a defence, apply to the Court for:

(a) an *order setting aside the writ or service* of the writ on him;

(b) an order declaring that the writ has not been duly served on him;

(c) the discharge of any order giving leave to serve a notice of the writ on him out of the jurisdiction;

(d) the discharge of any order extending the validity of the writ for the purpose of service;

(e) the protection or release of any property of the defendant seized or threatened with seizure in the proceedings;

(f) the discharge or any order made to prevent any dealing with any property of the defendant;

(g) *a declaration that in the circumstances of the case the Court has no jurisdiction over the defendant* in respect of the subject matter of the claim or the relief as may be appropriate.

Rule 10(2)

(2) A defendant who wishes to contend that the Court should not assume jurisdiction over the action on the ground that Malaysia is not the proper forum for the dispute shall enter an appearance and, within the time limited for serving a defence, apply to the Court for an order to stay of proceedings.

THE RELATIONSHIP — SHAREHOLDING

[3] The plaintiffs are part of the Bonia group of companies and the entity at the apex of the corporate structure is Bonia Corp Bhd ('BCB'). The defendant is a shareholder of the first plaintiff ('P1'). He owns 200,000 ordinary or 40% of the shareholding in P1 whereas 60% of the shareholding is owned by CRG Incorporated Sdn Bhd which is a wholly owned subsidiary of BCB. BCB owns

60% of the shareholding of the second plaintiff ('P2') and 40% of the shareholding of P2 is owned by 388 Venture Corp Sdn Bhd ('388 Venture'). The defendant is a director of 388 Venture and owns 80% of its shareholding. He is also a director of P2. The defendant is a Malaysian citizen and based on the official records in the Jabatan Pendaftaran Negara ('JPN') he has a residential address in Malaysia.

[4] However, in reality, the defendant is based in Vietnam and has residential addresses there and quite possibly businesses and assets there as well. At any rate, the defendant's status as far as Malaysia is concerned as per records of JPN, is that he has an address at No 33, Jalan SS 2/45, 47300 Petaling Jaya, Selangor Darul Ehsan. But the defendant's position is that he does not live at that address. The defendant claims that his residence is in fact in Vietnam. I turn now to the plaintiffs' claims.

THE AGREEMENTS

[5] The gist of the plaintiffs' case against the defendant is that on 28 September 2009, the plaintiffs entered into separate non-exclusive dealership agreements ('the agreements') with the defendant's nominee, Pham Thi Minh Phuong ('Phuong'). Under the agreements Phuong was appointed as a non-exclusive dealer to sell and market the plaintiffs' products in Vietnam. The plaintiffs contend that in reality the defendant was the actual party to the agreements and Phuong merely acted on the defendant's instructions. In other words, the plaintiffs' contend that Phuong was the defendant's nominee.

BREACH OF THE AGREEMENTS

[6] According to the plaintiffs' pleaded case, the defendant by himself and/or through Phuong has breached the express and/or implied terms of the agreements. Through letters issued by the plaintiffs to Phuong and copied to the defendant, the plaintiffs requested for rectification of the breaches within a stipulated time, but the breaches were not rectified.

TERMINATION OF THE AGREEMENTS

[7] Hence, the plaintiffs terminated the agreements and commenced the action herein against the defendant for breach of contract, tort of inducing breach of contract and breach of fiduciary duties. The plaintiffs' claims against the defendant are for recovery of the proceeds of sale from the businesses in Vietnam, an inquiry as to damages, an account of profits, general damages, exemplary damages, interest and costs. The plaintiffs causes of action are said to have accrued in or around May 2011.

PREVIOUS SUITS

[8] The plaintiffs previously sued the defendant by way of the following actions:

(a) Kuala Lumpur High Court Suit No 22NCVC-678 of 2011 (filed on 3 August 2011) ('the first suit');

(b) Kuala Lumpur High Court Suit No 22NCVC-49–01 of 2012 (filed on 12 January 2012) ('the second suit'); and

(c) Kuala Lumpur High Court Suit No 22NCVC-586–05 of 2012 (filed on 15 May 2012) ('the third suit').

[9] The first suit and the second suit were discontinued as the defendant could not be located and the cause papers could not be served on him in Vietnam. The third suit was served by way of substituted service at the defendant's address in Malaysia. On 3 September 2012, the defendant filed a notice of application in the High Court:

(a) to set aside the substituted service ('service prayer');

(b) to declare that the court has no jurisdiction to hear the dispute ('jurisdiction prayer'); and

(c) to declare that the court is not the appropriate forum to hear the dispute ('forum prayer').

[10] On 27 March 2013, in the third suit, the High Court allowed the service prayer, and dismissed the jurisdiction and forum prayers. On 1 April 2013, the defendant appealed to the Court of Appeal against the dismissal of the jurisdiction and forum prayers.

[11] On 9 April 2013, the plaintiffs appealed to the Court of Appeal against the High Court's decision to allow the service prayer. On 8 July 2013, the Court of Appeal allowed the defendant's appeal and granted the jurisdiction prayer. Consequently, the plaintiffs' appeal was withdrawn.

[12] The Court of Appeal held the view that the defendant was 'ordinarily resident' outside the jurisdiction and thus the High Court had no jurisdiction over the defendant. The plaintiffs were dissatisfied with the Court of Appeal's decision and applied to the Federal Court on 7 August 2013 for leave to appeal by way of Federal Court Civil Application No 08(i)-524–08 of 2013(W). On 29 January 2015, leave was granted by the Federal Court on the following question:

> Whether a Malaysian citizen with residential addresses in Malaysia according to public records, but who also resides outside Malaysia, can be said to 'reside' in

Malaysia for the purpose of section 23(1)(b) of the Courts of Judicature Act 1964.

[13] On 9 November 2015, via Civil Appeal No 02(I)-9–02 of 2015(W) the Federal Court allowed the plaintiffs' appeal and set aside the Court of Appeal's decision dated 8 July 2013 in its entirety. The third suit was thereafter discontinued and the present suit was filed on 31 October 2016.

[14] The defendant's position in so far as encl 10 is concerned is that based on the contents of the statement of claim, this court has no jurisdiction to try this action.

[15] Alternatively, the defendant's position as per encl 11 is that even if this court has the jurisdiction to try this action, this court should stay these proceedings as the proper or most appropriate forum to try this action is the court in Vietnam.

[16] The defendant maintains that the agreements are between the plaintiffs and Phuong and is purely a contractual matter between them and has nothing to do with him. The defendant maintains that Phuong is not and has never been his nominee. The defendant contends that the plaintiffs' claims of breach of contract, tort of inducement of breach of contract and tort of breach of fiduciary duties are all totally baseless and devoid of merit.

[17] In any event, according to the defendant, all these alleged causes of action occurred in Vietnam and not in Malaysia, all the relevant witnesses reside in Vietnam and all the relevant facts giving rise to such allegations, happened in Vietnam. Counsel for the defendant argued that all the duties and obligations under the agreements were to be performed in Vietnam and any purported termination of the agreements also occurred in Vietnam and has nothing to do with the defendant.

THE ARGUMENT (ENCL 10 — JURISDICTION)

[18] The starting point in this respect is s 23(1) of the Courts of Judicature Act 1964 ('the CJA') which reads as follows:

> (1) Subject to the limitations contained in Article 128 of the Constitution the High Court shall have jurisdiction to try all civil proceedings where:
>
> (a) the cause of action arose;
>
> (b) the defendant or one of several defendants resides or has his place of business;
>
> (c) the facts on which the proceedings are based exist or are alleged to have occurred; or

(d) any land the ownership of which is disputed is situated, A

within the local jurisdiction of the Court and notwithstanding anything contained in this section in any case where all parties consent in writing within the local jurisdiction of the other High Court.

B

[19] It was contended for the defendant that this court has no jurisdiction over the defendant for the following reasons. First, in so far as the defendant's residence and place of business is concerned, it was submitted that the defendant's place of residence is in Vietnam, at an address known as B77, Khu Dan Cu Kim Son, Nguyen Huu Tho, Phuong Tan Phong, District 7, Ho Chi Minh City, Vietnam. The defendant claims that he also has an address at Level 4, Huong Vuong Centre, 126, Huong Vuong, Ward 12, District 5, Ho Chi Minh City, Vietnam. C

[20] The defendant maintains that he does not presently have any residence or place of business in Malaysia. He says that this fact is known to the plaintiffs. The defendant also maintains that there is no evidence that the defendant resides at No 33, Jalan SS 2/45, 47300 Petaling Jaya, Selangor Darul Ehsan at the time of filing of this action. It was emphasised for the defendant that all the businesses of the defendant are located in Vietnam and that there is no allegation to the contrary in the statement of claim. D E

[21] The defendant argues that the plaintiffs were fully aware of the fact that even the defendant's Malaysian address as appearing in the record of the Companies Commission of Malaysia ('CCM') had since been changed following the defendant's letter dated 11 November 2015 to the company secretary of P2 requesting for a change of address. The defendant also relies on the fact that he made an attempt to change his address at the records of JPN on 12 November 2015 but was unsuccessful because they will not accept a foreign address for registration purposes. The defendant points to the fact that the Federal Court in Civil Appeal No 02(I)-9–02 of 2015(W) allowed the plaintiffs' appeal on 9 November 2015, which was before the defendant took steps to change the record of his address in Malaysia. According to the defendant this is crucial because the plaintiffs relied entirely on such historical records to claim that the defendant is still residing in Malaysia for the purpose of s 23(1)(b) of the CJA. F G H

[22] According to the defendant, the plaintiffs were aware that the defendant was at all material times in Vietnam and had even gone to the extent of lodging a police report to initiate criminal investigations in Vietnam against the defendant. Hence, the defendant says that this is clear evidence that factually the defendant was residing in Vietnam at the material time. Thus, the defendant maintains that it is fallacious for the plaintiffs to allege that the defendant is residing in Malaysia at the material time. I

[23] The defendant says that save for the bare allegation by the plaintiffs that the defendant had been travelling in and out of Malaysia (which has been denied and disputed by the defendant), the plaintiffs have completely failed to adduce any evidence in support of the bare allegation, which is totally devoid of merit. The defendant relied on the finding of the Court of Appeal which opined that at least since October 2010, the defendant was 'ordinarily resident' in Vietnam and that this finding remains unrebutted.

[24] The defendant also contends that the fact that the plaintiffs admitted that they employed certain local agents in Vietnam (such as Messrs Audier & Partners and Nguyen Cong To) to carry out surveillance activities and attempted service of court process on the defendant in Ho Chi Minh City, lends support to the fact that the plaintiffs knew at all material times that the defendant was residing in Vietnam.

[25] Next, it is alleged by the defendant that the plaintiffs' causes of action, whether in tort or in contract (if any), arose in Vietnam and not in Malaysia because:

(a) under paras 35, 47, 59 and 60 of the statement of claim — the plaintiffs' allegation as to the various purported breaches of the agreements by the defendant and Phuong, occurred in Vietnam;

(b) under para 50 of the statement of claim — the plaintiffs' notice of termination of the agreements were served on Phuong in Vietnam;

(c) under paras 52 and 60 of the statement of claim — the plaintiffs' allegation of wrongful denial of access to the retail outlets occurred in Vietnam;

(d) under para 62 of the statement of claim — the plaintiffs' allegation that the defendant induced Phuong to commit a breach of the agreements occurred in Vietnam;

(e) under paras 63–64 of the statement of claim — the plaintiffs' allegation as to the various breaches of fiduciary duties by the defendant occurred in Vietnam; and

(f) under para 65 of the statement of claim — the plaintiffs' allegation as to P2's assets and properties being purportedly held by the defendant as the trustee thereof, are all located in Vietnam.

[26] According to the defendant, it is not pleaded in the statement of claim that any of the alleged causes of action occurred in Malaysia. It is also not pleaded in the statement of claim that either the defendant or the Vietnamese party (Phuong) was contractually required under the agreements to make any payment to the plaintiffs in Malaysia. On the contrary, it was pleaded

in para 47(iv) of the statement of claim that the defendant had denied the plaintiffs 'access to their Goldsoft Consignment and Inventories System in Vietnam since 14 May 2011'.

[27] It was also pleaded in para 47(v) of the statement of claim that the defendant had removed 'two of the plaintiffs' representatives, namely Liew Cheung Yip and Chai Chee Pang, from the Vietnam office on 16 May 2011'. It was further pleaded in paras 51–52 of the statement of claim that the plaintiffs' representatives were denied access by the defendant to the 'retail outlet in Vietnam' on 28 June 2011. In addition, there is no contractual provision in the agreements that any payment to the plaintiffs under the agreements must be made in Malaysia. According to the defendant, it is not even alleged in any of the plaintiffs' affidavits filed herein that any payment under the agreements was ever made or required to be made to the plaintiffs in Malaysia.

[28] The defendant therefore argues that all relevant facts to pertaining these proceedings occurred in Vietnam. It was therefore submitted that the alleged causes of action occurred in Vietnam.

[29] For the plaintiffs it was argued at the outset that by reason of the decision by the Federal Court which had decided that the court has jurisdiction over the defendant, the defendant is estopped from filing encl 10 and once again challenging jurisdiction. Counsel cited the case of *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 at p 197 to contend that estoppel applies and that there is jurisdiction in accordance with s 23(1)(b) of the CJA.

[30] The plaintiffs contend that in any event, the following facts demonstrate that the court has jurisdiction under s 23(1)(b) of the CJA as the defendant resides in Malaysia for the purposes of that provision:

(a) the defendant is a Malaysian citizen; and

(b) the defendant's publicly declared residential address as stated in his NRIC is 33, Jalan SS 2/45, 47300 Petaling Jaya.

[31] The plaintiffs maintain that this address is the defendant's self-declared residential address in Malaysia in view of reg 4(a)(cc)(iii) of the National Registration Regulations 1990, which states that 'any person who is required to register under reg 3 shall give the following particulars to the registration officer — the full address of his place of residence within Malaysia'.

[32] In addition, the defendant has maintained, and continues to maintain, clear links with Malaysia and this is to be inferred from the fact that the

defendant continues to be a director of Malaysian companies, namely P2, 388 Venture Corp Sdn Bhd, Triple Frontier Sdn Bhd and Leisure Methods Sdn Bhd. The defendant continues to be a shareholder of Malaysian companies, namely a 40% shareholder of P1 and 80% shareholder of 388 Venture Corp Sdn Bhd (which owns 40% of P2). Hence, it was argued for the plaintiffs that there is sufficient nexus with Malaysia for s 23(1)(b) of the CJA to apply.

[33] In so far as the applicability of the decision of the Federal Court is concerned, it was argued for the defendant that the decision must be seen in the light of subsequent events where he had instructed the company secretary of P2 to change the address from the Malaysian address to his address in Vietnam. It is also in evidence that the defendant was not successful in changing his address under reg 4(a)(cc)(iii) of the National Registration Regulations 1990 as the JPN will only register the local address of a Malaysian citizen.

THE ARGUMENT (ENCL 11 — FORUM CONVENIENS)

[34] It was contended for the defendant that even if the High Court has jurisdiction to try this action (which is disputed), the proper and most appropriate forum to hear and try this action is the court in Vietnam.

[35] It was submitted that the court in Vietnam is the proper forum with which this action has the most real and substantial connection — see: *American Express Bank Ltd v Mohamed Toufic Al-Ozeir & Anor* [1995] 1 MLJ 160 at p 281. The defendant's reasons for contending that the court in Vietnam has the most real and substantial connection with this action are:

(a) at the time of filing and service of this action, the defendant was residing in Vietnam;

(b) the subject-matters of the plaintiffs' claims are located and occurred in Vietnam;

(c) all the relevant witnesses to the plaintiffs' claims, that is (amongst others) Van Thuy Hanh, Pham Thi Minh Phuong, Pham Ngoc Binh and the defendant himself, are all located in Vietnam;

(d) all the retail outlets disputed by the plaintiffs, are located in Vietnam;

(e) all the stocks of the products disputed by the plaintiffs, were located in Vietnam;

(f) all the records relating to sales and inventory pertaining to the said retail outlets disputed by the plaintiffs, are located in Vietnam;

(g) all the records relating to Phuong's account books alleged by the plaintiffs as per para 29(xv) of the statement of claim, are located in Vietnam;

(h) all the records and documents relating to the server connection and 'Goldsoft Consignment and Inventories System' as per paras 47(iii) and 47(iv) of the statement of claim, are located in Vietnam;

(i) the fact in issue as to whether the plaintiffs' representatives who conducted the 'inventory and stock take of the products' on 28 June 2011 and whether the plaintiffs' representatives were 'denied access' allegedly by the defendant and Phuong, all occurred in Vietnam;

(j) all the allegations of alleged wrongdoings purportedly committed by the defendant against the plaintiffs, happened in Vietnam;

(k) the plaintiffs' claim that the dispute may be litigated 'much faster' in Malaysia is totally devoid of merit, given the history of the litigation between the parties starting from the year 2011 until now;

(l) the plaintiffs' witnesses (Chong Chin Fook, Yeow Kim Thai and Ong Boon Huat) have been to Vietnam on various occasions and have no problem travelling to Vietnam. This is unlike the defendant's witnesses (Van Thuy Hanh, Pham Thi Minh Phuong, Pham Ngoc Binh) who (insofar as the defendant was aware of) have never been to Malaysia;

(m) as regards the issue of execution of any judgment, the value of the shares that the defendant owned in the few Malaysian companies mentioned by the plaintiffs are nominal and negligible. His real assets are all in Vietnam; and

(n) there is no proper reason as to why any execution of judgment cannot be effected in Vietnam.

[36] It was submitted for the defendant that he has not submitted himself to the jurisdiction of this court. The defendant takes the position that the very fact that he filed encl 10 (jurisdiction) and encl 11 (forum non-conveniens), immediately upon being notified of this action, clearly indicates that he did not submit to the jurisdiction of this court.

[37] In amplification, counsel for the defendant said that the defendant had explained in paras 6–7 of the *afidavit sokongan defendan* dated 15 November 2016 (encl 8) as to why he instructed his solicitors to accept service of legal process in respect of the present suit. The defendant said that given the history of litigation between the parties, he wanted to prevent the plaintiffs from abusing the court process by applying for substituted service as was done in the third suit. The defendant fears that after serving the papers by substituted service, the next step would be for the plaintiffs to take default judgment against him.

[38] The defendant contends that he is not a party to the agreements and is not bound by the terms therein. It was submitted for the defendant that even if the court holds that the defendant is bound by the terms of the agreements:

(a) cl 27.1 of the agreements is clear in that the Malaysian courts have no exclusive jurisdiction over any dispute arising from the agreements;

(b) it was also agreed that the agreement shall be construed in accordance with the laws of Malaysia and Vietnam. This does not in any way assist the plaintiffs' case because if the case is litigated in Malaysia, expert evidence on Vietnamese law would have to be called and vice versa if the case is litigated in Vietnam; and

(c) in fact, cl 27.1 envisages that any dispute between the parties may also be litigated in Vietnam.

[39] For the plaintiff it was argued that the defendant is the real party to the agreements, and that Phuong is merely the defendant's nominee in Vietnam who was at all times acting on the instructions of the defendant. It was emphasised that cl 27.1 of the agreements provides that '... the parties hereto hereby submit to the *(sic)* non-exclusion jurisdiction of the Malaysian courts'.

[40] Therefore it was contended for the plaintiff that the defendant, as the actual party to the agreements, had agreed and submitted to the jurisdiction of the Malaysian courts. Counsel submitted that as held in *American Express* at p 168, a submission to the jurisdiction of a court is a significant fact which militates against an argument that another court is the appropriate forum.

[41] Counsel also referred to cl 26.2 of the agreements which provides that all disputes shall be arbitrated under the Malaysian Arbitration Act 1952. It was argued that the intention of the parties to the agreement was that all disputes shall be arbitrated in Malaysia.

[42] Next, counsel for the plaintiffs referred to the cl 27.1 of the agreements (governing law) which provides that the agreements are governed by Malaysian and Vietnamese law. Counsel referred to *American Express* at p 168, where the Supreme Court had enunciated that a choice of law clause is also a significant fact which militates against an argument that another court is the appropriate forum. Then counsel focused on the causes of action in the present case and argued that they arose in Malaysia and that the facts occurred in Malaysia.

[43] In amplification, counsel for the plaintiffs made the following points. He said that the plaintiffs have sued the defendant for (a) breach of contract, (b) tort of inducing a breach of contract and (c) breach of fiduciary duties as a

director of P2. With regard to breach of contract, the plaintiffs contend that Phuong (and by extension the defendant):

(a) failed to deposit the proceeds of sale in the plaintiffs' bank in Malaysia;

(b) failed to provide evidence to the plaintiffs in Malaysia on a daily basis by way of receipts of proof of sales as well as bank-in slips no later than the next working day from the day the said bank-in slips are issued;

(c) failed to return to the plaintiffs in Malaysia, the unsold products upon event of default;

(d) cut-off the server connection on 14 May 2011, thereby preventing the plaintiffs' usual access from Malaysia, to the system to retrieve sales and stocks information; and

(e) denied the plaintiffs' access to the Goldsoft Consignment and Inventories System in Malaysia since 14 May 2011.

[44] The plaintiffs' contention in relation to the tort of inducing a breach of contract is that the defendant has induced Phuong to breach the agreements. The plaintiffs' contention in relation to the defendant's breach of fiduciary duties is that the defendant owed fiduciary duties to P2, a private limited company in Malaysia, as its director and has breached these duties under Malaysian company law. Hence, it was contended that:

(a) the plaintiffs' causes of action arose in Malaysia; and

(b) the facts on which this suit are based exist or are alleged to have occurred in Malaysia.

[45] The next topic that was dealt with was 'expert evidence'. Here it was argued for the plaintiffs that based on the factual matrix and the legal issues that arose, Malaysian law will be key in this suit. Therefore, if the dispute is litigated in Vietnam, expert evidence will have to be led on Malaysian law, which will cause unnecessary costs and delay.

[46] Then counsel dealt with execution of judgment and in this regard it was contended that in the event judgment is issued by this court in favour of the plaintiffs, the judgment can be executed in Malaysia as the defendant has assets in Malaysia, namely his shares in Apex Marble Sdn Bhd, 388 Venture Corp Sdn Bhd, Triple Frontier Sdn Bhd and Leisure Methods Sdn Bhd.

[47] Further, counsel argued that any judgment obtained in Vietnam will not be enforceable in Malaysia, and the plaintiffs will have to sue the defendant afresh in Malaysia.

[48] Consequently, the plaintiffs will have to commence proceedings against the defendant in Malaysia in any event. The next topic was remedies and in this context it was argued for the plaintiffs that the effect of a stay will be to compel the plaintiffs to sue in Vietnam and confine the plaintiff to remedies (if any) available and enforceable in Vietnam. As was held in *American Express* at p 167, a 'most important factor' that must be considered by this court is whether it would be unjust to the plaintiffs to confine them to remedies in Vietnam. Next on the issue of time and costs, it was argued for the plaintiffs that if this dispute is heard and determined by this court, it will be resolved much faster than in Vietnam, and this will save substantial time and costs. It was pointed out that the plaintiffs' main witnesses, namely Chong Chin Look, Yeow Kim Thai and Ong Boon Huat, are in Malaysia.

[49] Based on the above it was submitted for the plaintiffs that:

(a) the defendant has failed to satisfy this court that a Vietnam court would be the appropriate forum;

(b) this suit has a real and substantial connection with this court; and

(c) this suit should be tried by this court for the interests of all the parties and for the ends of justice.

ANALYSIS AND CONCLUSION

[50] In so far as the credibility of the factual averments that were made by the plaintiffs as per the statement of claim, the position in law is that where jurisdiction is challenged, all pleaded facts are 'assumed' to be true. This was clearly stated by the Court of Appeal in *Dato' Param Cumaraswamy v MBF Capital Bhd & Anor* [1997] 3 MLJ 824 per Gopal Sri Ram JCA at p 839 where it was held that:

> It may be added for completeness that *where jurisdiction is challenged, the facts as pleaded in the statement of claim must be assumed to be true*. See *Rediffusion (Hong Kong) Ltd v A-G of Hong Kong* [1970] AC 1136.

[51] With those observations, I now move on to consider one of the issues that was ventilated in the present case in determining jurisdiction which pertains to the obligation of the defendant (as debtor) to make payment to the plaintiffs (as creditors) in Malaysia. In this regard, it was argued for the plaintiffs that the rule is that the debtor must pay the creditor at the latter's location, unless it is specified otherwise of the agreement. In this context, counsel for the plaintiffs relied on the case of *Shearn Delamore & Co & Anor v Joseph Lee Henn Shen* [1998] 3 MLJ 833 at pp 842–843 per NH Chan JCA who held as follows:

> This brings us to the next question, which is, must the money be paid?

In *Rein v Stein* [1892] 1 QB 753, Kay LJ said at p 758:

> ... Prima facie, commercial transactions, when cash is to be paid by one person to another, that means that it is to be paid at the place where the person who is to receive the money resides or carries on business.

In *The Eider* [1893] P 119, Lord Esher MR said at p 131:

> The parties to that contract are now abroad, and neither the plaintiffs nor defendants are now in England. The contract is to perform work to that ship; whether it be called salvage work or not, seems to be immaterial. It is for work to be done to that ship, and payment is to be made for that work. There is no place specified in the contract for the payment. What, then, is the ordinary rule? That the debtor must follow his creditor, and must pay where his creditor is. If this were a contract made in England, by two people who were at the time in England, and payment was to be made in England, nevertheless, if the creditor went abroad and was abroad at the time payment was to be made, the debtor need not go after his creditor to pay him abroad; he may wait till his creditor comes back to England. The case of *Fessard v Mugnier* (1865) 18 CBNS 286 shows that absence of the creditor from England affords an excuse for the want of tender or payment by the debtor where the creditor has gone abroad after the making of the contract, but nevertheless the proper place of payment is determined by the rule that the debtor must follow the creditor, and if he makes a bargain with a person who is abroad at the time when the contract is made, which is the case here — and what makes this case stronger is, that it is made by a foreigner who is abroad, with a foreigner who is also abroad — the place of payment according to the contract follows the general rule, and is to be made where the creditor is.

At p 134, Lindley LJ said:

> ... Where is the obligation to pay to be performed? The services were to be performed in English waters, and the vessel was to-be taken to Southampton; but the contract is wholly silent as to where payment is to be made. Can this question be solved by any of those principles of law by which lawyers are guided? The answer is, 'Yes'. The person to pay is a German company; the person to whom payment is to be made is a German company; and the obligation to pay is to be performed in Germany. It appears to me that this conclusion is too plain for reasonable argument to the contrary.

and at pp 136–137, Bowen LJ said:

> The general rule is that where no place of payment is specified, either expressly, or by implication, the debtor must seek his creditor.

In *Charles Duval & Co Ltd v Gans & Anor* [1904] 2 KB 685, Mathew LJ said at p 692:

> ... Where a contract like that in the present case is made with such a company, and no place of payment is specified therein, it appears to me that, in the absence of anything to the contrary, the intention may be inferred that the payment should be made to the company where its office is situated.

But, in this country we have s 50 of the Contracts Act which says that if no place is specified for the performance of a promise, is the duty of the promisor to apply to the promisee to appoint a reasonable place for the performance of the promise, and to perform it at that place. Section 50 reads:

> When a promise is to be performed without application by the promisee, and no place is fixed for the performance of it, it is the duty of the promisor to apply to the promisee to appoint a reasonable place for the performance of the promise, and to perform it at that place.
>
> ILLUSTRATION
>
> A undertakes to deliver a thousand gantangs of rice to B on a fixed day. A must apply to B to appoint a reasonable place for the purpose of receiving it, and must deliver it to him at that place.

In the present case, no place had been specified for the performance of the statutory promise by the respondent to pay (s 171 of the Contracts Act), his duty was to apply to the appellants to name a place for the payment to be made, and to pay it to them at that place (s 50 of the Contracts Act). Section 50 does not mean that it is for the respondent to choose the venue for the payment to be made to the appellants. It is for the appellants to name the place where they want to be paid. Here the appellants have asked to be paid in Kuala Lumpur.

And to answer the question, where must the money (which the respondent is bound to pay to the appellants as money had and received under s 171 of the Contracts Act) be paid? The answer is that where no place is specified it must be paid to the appellants at the place appointed by the appellants for the payment to be made, namely, at their firm's address at Kuala Lumpur in Malaya.

[52] As for the contractual provisions in so far as the payment obligation is concerned, it is relevant to refer to cl 7.3 of the agreement which reads as:

> Methods of Banking in Proceeds of Sale
>
> (a) The Dealer shall deposit the proceeds for sale as evidenced by the cash register of the Business in a bank specified by the Company on a weekly basis or at such time the aggregate collection is above the pre-determined cash float as approved by the Company. Should the cash collected exceed the pre-determined cash float then the excess shall be bank-in immediately.
>
> (b) The Dealer shall further evidence to the Company on a daily basis receipts of proof of sales as well as bank in slips no later than the next working day from the day the said bank-in slip is issued.

[53] Next, and still on the point relating to the obligation to make payment to the plaintiffs in Malaysia, it is pertinent to refer to the affidavit of Chiang Fong Yee affirmed on 6 December 2016 (encl 13) on behalf of the plaintiffs, which reads as:

I deny paragraphs 22, 25 and 26 of Enclosure 8. I am advised by the Plaintiffs' Solicitors and verily believe as follows:

(i) The plaintiffs' causes of action against the Defendant are for breach of contract, the tort of inducing breach of contract and breach of fiduciary duties.

(ii) The plaintiffs' contention in relation to the Defendant's breach of the Agreements is that the Defendant is the real party to the Non-Exclusive Dealership Agreements entered between the respective Plaintiffs and Pham Thi Minh Phuong *('Phuong')* on 28th September 2009 *('Agreements')*, and Phuong is merely the Defendant's nominee in Vietnam who at all times was acting on the instructions of the Defendant. In particular:

(a) Phuong failed to deposit the proceeds of sale in the Plaintiffs' bank *in Malaysia* (see Clause 7.3 (a) of the Agreements).

(b) Phuong failed to further evidence to the Plaintiffs *in Malaysia* on a daily basis receipts of proof of sales as well as bank-in slips no later than the next working day from the day the said bank-in slips are issued (see Clause 7.3(b) of the Agreements).

(c) Phuong failed to return to the Plaintiffs *in Malaysia* the unsold products upon event of default (see Clause 7.4(b) of the Agreements).

(d) Phuong cut-off the server connection on 14th May 2011, thereby preventing the Plaintiffs' usual access *from Malaysia* to the system to retrieve sales and stocks information.

(e) Phuong had denied the Plaintiffs access to the Goldsoft Consignment and Inventories System *in Malaysia* since 14th May 2011.

(f) Phuong had submitted to the jurisdiction of the Malaysian Courts, as provided in Clause 27.1 of the Agreements.
A copy of the Non-Exclusive Dealership Agreement between the 1st Plaintiff and Phuong dated 28th September 2009 is annexed hereto and marked as Exhibit CFY-26.
A copy of the Non-Exclusive Dealership Agreement between the 2nd Plaintiff and Phuong dated 28th September 2009 is annexed hereto and marked as Exhibit CFY-27.

(iii) The Plaintiff's contention in relation to the Defendant's tort of inducement of breach of contract is found at paragraph 62 of the Statement of Claim, whereby the Defendant has induced Phuong to breach the Agreements as stated in paragraph 9 (ii) above.

(iv) The Plaintiffs' contention in relation to the Defendant's breach of fiduciary duties is found at paragraph 63 of the Statement of Claim. In brief, the Defendant owed fiduciary duties to the 2nd Plaintiff, a private limited company *in Malaysia*, as its Director and has breached these duties

under Malaysian law. (Emphasis added.)

[54] I turn now to the law on forum conveniens. In *American Express Bank Ltd v Mohamed Toufic Al-ozeir & Anor* [1995] 1 MLJ 160 at pp 167–168 in dealing with a stay application based on forum non conveniens, the Supreme Court held as follows:

(a) the word 'conveniens' in forum non conveniens means *suitability* or *appropriateness* of the relevant jurisdiction, and not convenience;

(b) *there must be some other tribunal, having competent jurisdiction*, in which the case may be tried more suitably *for the interests of all the parties and for the ends of justice*;

(c) the *defendant has to satisfy the court that some other forum is more appropriate*; and

(d) the court must consider in any event a most important factor, namely *whether it would be unjust to the plaintiff to confine him to remedies elsewhere.*

[55] It is trite that a choice of law or choice of forum clause will ordinarily tilt the balance to the choice as stated in the contractual provision. But this position is not carved in stone and there could be facts and circumstances which may displace the initial presumption or the starting position. Here, in so far as contractual clauses are concerned, it is relevant to refer to the cll 26.2 and 27.1 of the agreement and they read as:

26.0 ARBITRATION

26.1 All disputes, controversies or differences which may arise between the parties in respect of this Agreement shall be settled through mutual consultation.

26.2 Should the parties however fail to resolve any controversies over the interpretation of or any disputes arising out of this Agreement shall then be resolved by referring the controversy or dispute arising to a single arbitrator in accordance with and subject to the provisions of the Arbitration Act 1952 in Malaysia or any statutory modification or re-enactment thereof for the time being in force.

27.0 APPLICABLE LAW

27.1 This Agreement and all rights and obligations of the parties hereof shall be governed and construed in accordance with the Laws of Malaysia and Vietnam and the parties hereto hereby submit to the *(sic)* non-exclusion jurisdiction of the Malaysian Courts.

[56] Finally, I refer to the following passages from the judgment of the Court of Appeal in *Harrah's Operating Co Inc (trading as Harrah's Casino Hotel Lake Tahoe & Bill's Lake Tahoe Casion) v Wu Yun Shya Josephine and another appeal* [2008] 4 MLJ 63 per Suriyadi JCA paras [14], [20] and [21] which I find to be

instructive:

> [14] ... This doctrine of forum non conveniens in a gist refers to the discretionary power of court to decline jurisdiction when convenience of parties and ends of justice would be better served if action were brought and tried elsewhere. The phrase does not mean that the court before which the issue is being canvassed is not convenient but that some other court is more suitable (*Black's Law Dictionary*). *Spiliada Maritime Corpn v Cansulex Ltd, The Spiliada* [1987] AC 460 had accepted this doctrine which originated from Scotland when Lord Goff said:
>
> > ... there is some other tribunal, having competent jurisdiction in which the case may be tried more suitably for the interests of all the parties and for the ends of justice.
>
> [20] As the appellant was entitled legally to commence its action in Malaysia, apart from the respondent having failed to satisfy the court that some other forum was more suitable or appropriate, it would be quite unjust to confine the appellant to remedies elsewhere. The source of that remark is the case of *American Express Bank Ltd v Mohamed Toufic Al-Ozeir & Anor* [1995] 1 MLJ 160, where after discussing the above case of *Spiliada Maritime Corpn v Cansulex Ltd, The Spiliada* [1987] AC 460 Peh Swee Chin FCJ had added:
>
> > that in all cases of either a defendant's application for stay of proceedings ... *it will be obligatory for a Malaysian court to consider in any event, a most important factor, ie whether 'it would be unjust to the plaintiff to confine him to remedies elsewhere'*. It is indispensable when a Malaysian court considers all cases in connection with forum non-conveniens.
>
> [21] It must be appreciated that the United States of America is not a signatory of the Reciprocal of Enforcement of Judgments Act 1958, and as such a successful judgment there may not be easily enforced in Malaysia. Imagine *the monumental problems and sufferings that will befall the appellant if the matter were to go through some fresh legal process all over again in Malaysia merely to enforce that judgment*. Apart from being costly it would be *plainly illogical and unjust*. (Emphasis added.)

[57] With the above legal and factual considerations in mind, I will proceed to deal with the issues at hand. The first issue that I will deal with is jurisdiction. The imperative question is whether this court has jurisdiction over the defendant. The scope of the court's jurisdiction is circumscribed by s 23(1) of the CJA. If the plaintiffs' claim against the defendant fits into any of the categories under s 23(1) of the CJA then clearly there is jurisdiction.

[58] Following the Federal Court's decision arising under the third suit on the issue of the defendant's status as a resident in Malaysia, the fact that the defendant has a somewhat long lasting presence in Vietnam in terms of taking up residence there or having business interest or assets there, does not in my view, emasculate his status as a resident in Malaysia for purposes of s 23(1)(b) of the CJA and the so-called test of being 'ordinarily resident' in Malaysia which was previously formulated by the Court of Appeal is to take the wrong

approach to the question as to whether the defendant resides in Malaysia for purposes of s 23(1)(b) of the CJA.

[59] In my view, the fact that he has an address in Malaysia as per JPN records is sufficient to trigger the qualification of residence in Malaysia for purposes of s 23(1)(b) of the CJA. And the fact that he neither physically resides at the address as per JPN records nor that he rarely visits Malaysia, does not detract from his status as a resident in Malaysia.

[60] Thus, even if he is physically not in Malaysia, he is presumed to be residing in Malaysia for purposes s 23(1)(b) of the CJA.

[61] Here it is also relevant and significant that the defendant continues to have a connection with Malaysia by way of his shareholdings and directorships in other companies in Malaysia. Of course the defendant has gone to great lengths to have his address in the CCM records changed but all of this appears to be reactive measures that have been taken as a consequence of the decision by the Federal Court arising out of the third suit.

[62] The other category under s 23(1) of the CJA which gives rise to jurisdiction is the fact that the cause(s) of action has (or have) accrued in Malaysia (s 23(1)(a) of the CJA) or the facts giving rise to the claim(s) occurred in Malaysia (s 23(1)(c) of the CJA). At the outset I must state that this court has not made any definite findings with respect to the alleged causes of action or the credibility of the narrative of facts which are said to have given rise to the causes of action. For purposes of dealing with the issue of jurisdiction, all facts in the statement of claim, are merely deemed to be true.

[63] There are three causes of action by P2 and two causes of action by P1. P1's claim against the defendant is for breach of contract and inducing a breach of contract whereas P2's claim is for breach of contract, inducing a breach of contract and for breach of director's duties. No doubt the defendant is correct in asserting that much of the narrative of facts with regards to the plaintiff's complaints occurred in Vietnam.

[64] But at the same time, I cannot ignore the unequivocal assertion by the plaintiffs that Phuong and by extension the defendant, had at the very least, failed to remit payments (proceeds of sale) to the plaintiffs bank in Malaysia and had cut off access to the servers whereby the plaintiffs could not have access to the system in Malaysia. Further, it also alleged that the plaintiffs were denied access to the system to retrieve sales and stocks information and were further denied access to the Goldsoft Consignment and Inventories System, in Malaysia (see: affidavit of Chiang Fong Yee affirmed on 6 December 2016 — encl 13).

[65] According to the plaintiffs, these difficulties or impediments to having access were experienced in Malaysia. The other complaint is that Phuong/the defendant failed to provide evidence to the plaintiffs in Malaysia on a daily basis by way of receipts of proof of sales as well as bank-in slips, no later than the next working day from the day that the bank-in slips are issued. It is also alleged that Phuong/the defendant failed to return to the plaintiffs in Malaysia, the unsold products upon the event of default.

[66] Quite apart from pleading a cause of action in contract (breach of contract) and the tort of inducing a breach of contract, P2 has specifically pleaded that the defendant had breached his duties as a director of P2. According to P2, the defendant is in breach of his duties as a director of P2 which is a Malaysian company and the defendant's duties are owed to P2, in Malaysia. The relevant law here is obviously Malaysian company law. Thus, any breach of those duties will give rise to a cause of action in Malaysia and not in Vietnam.

[67] In my view, the fact that the defendant had allegedly failed to remit payments to the plaintiffs in Malaysia, failed to return the unsold stock upon the event of default, failed to send the bank in slips to the plaintiffs and had cut off the servers which prevented the plaintiffs from having access to the system from Malaysia and there being an allegation of breach of directors duties in respect of P2, which is a company in Malaysia and the breach having to be determined in accordance with Malaysian company law, are all matters which manifested or occurred in Malaysia and thus gives rise to the jurisdiction of this court under ss 23(1)(a) and 23(1)(c) of the CJA. Also, it is my finding that since the defendant has a residential address at No 33 Jalan SS 2/45, 47300 Petaling Jaya, Selangor Darul Ehsan, he is a person who 'resides' within the jurisdiction, thus satisfying s 23(1)(b) of the CJA. As such, this court has in the requisite jurisdiction over the defendant.

[68] Next, I turn to the issue of forum non conveniens. At the outset, it must be emphasised that the burden is on the defendant to demonstrate to this court as to why the court in Vietnam is the more appropriate forum for this dispute to be ventilated. As was rightly pointed out by counsel for the plaintiffs, the choice of law clause and choice of forum clause in the agreement and the arbitration clause are strong indicators of the intention of the parties as to which is the most appropriate forum for the adjudication of the dispute. Hence, I find that in the present case, cll 26.2 and 27.1 of the agreement strongly indicate that the Malaysian court is the appropriate forum.

[69] The other important considerations are that the defendant has assets in Malaysia in the form of shares in companies and if judgment is entered against him, those assets can be utilised to realise any judgment. On the other hand,

there is no evidence of what assets the defendant has in Vietnam. If a suit is filed in Vietnam, then the plaintiffs would have to file fresh proceedings in Malaysia based on the judgment that is obtained in Vietnam.

[70] There is currently no evidence as to whether the plaintiffs' causes of action which accrued in or around May 2011, are time-barred under Vietnamese law and whether any of the causes of action are even recognised under the laws of Vietnam. Thus, there is no evidence that the plaintiffs would be able to pursue the same remedies if the suit is filed in Vietnam.

[71] There is also the important and imperative consideration of whether it would unjust or harsh or burdensome to insist that the plaintiffs should have filed the suit in Vietnam. As stated earlier, the burden is on the defendant to demonstrate to this court that the court in Vietnam is the main appropriate forum. In this regard, it is my view that it would be far too onerous and burdensome for the plaintiffs to file a suit in Vietnam as there is absolutely no evidence that the action will be disposed of expeditiously in Vietnam quite apart from the cost of conducting a case there and having to transport all of the plaintiffs' witnesses to Vietnam. It would also be unjust to insist that the suit be filed in Vietnam when no evidence has been adduced as regards to the issue of time-bar, availability of causes of action or remedies.

[72] Although it is obvious that some of the narrative of facts had occurred in Vietnam, the issues or complaints that have been leveled against the defendant are matters that can and must ultimately be dealt with by this court.

[73] Thus far, it is apparent the law that is relevant vis a vis the causes of action against the defendant is Malaysian contract and company law with there being no suggestion that Vietnamese law is or would be involved in the determination of the dispute. In any event, if at all Vietnamese law is involved, that too in my view can be overcome with suitable expert evidence on Vietnamese law being adduced during the trial of this action before this court.

[74] Of course, the plaintiffs may have difficulty in proving damages or in the taking of accounts as the unsold stock and other information or documents may well be in Vietnam, but these are litigation impediments which the plaintiffs would have foreseen and will have to overcome at the appropriate juncture. In conclusion, it is clear that the defendant has failed to discharge the burden of establishing convincingly or at any rate on a balance of probabilities that the court in Vietnam is the more appropriate forum for the adjudication and determination of the plaintiffs' claims against the defendant.

THE OUTCOME

[75] For the reasons as stated above, my ruling on the defendant's applications are as follows:

(a) encl 10 (jurisdiction) — the defendant's application is dismissed with costs of RM5,000 (subject to 4% allocatur); and

(b) encl 11 (forum conveniens) — the defendant's application is dismissed with costs of RM5,000 (subject to 4% allocatur).

Order accordingly.

Enclosures 10 and 11 dismissed with costs.

Reported by Dzulqarnain Ab Fatar